

“It’s a Gut Feeling”: The Craft of Diagnosing Victim Credibility and Case Convictability

by

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ABSTRACT

The #MeToo Movement has sparked debate across the world as to how prevalent sexual assault is and what can be done to help survivors. Although sexual assaults are the least likely crime to be reported to police, it is important to examine the criminal justice system's treatment of these cases. The focus of this thesis is on the prosecution of sexual assault cases. Specifically, the goal is to uncover the factors that impact prosecutorial decision-making in sexual assault cases across three different timepoints. This study examines qualitative interviews conducted in 2010 with 30 Deputy District Attorneys from Los Angeles, California. Results reveal that prosecutors' largely rely on their "gut feelings" about whether a case will be successful based on a combination of factors, including: victim credibility, availability of evidence, and corroboration of the victim's story, just to name a few. The study concludes with an examination of these results, a discussion on the limitations of the study and a guide for future research, and what policy changes can come from these findings.

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CHAPTER 1

INTRODUCTION

In 2015, Stanford student athlete Brock Turner allegedly raped an unconscious woman behind a dumpster. He was charged with five felony counts, including rape of an unconscious woman, rape of an intoxicated woman, and sexual assault with a foreign object, but was only convicted of three (Hamilton, 2015). Originally, Turner was facing up to fourteen years in prison; however, this was reduced to only six months, three years probation, and registering as a sex offender for life (Rocha & Winton, 2016). Even more recently, Harvey Weinstein, a major United States film producer, was accused by dozens of women for sexual harassment over the course of his decades-long career, with the first accusation in October 2017. Weinstein has been charged with only a few counts of assault and released on bail – representing punishment which is not proportionate to the crimes he has allegedly committed. The injustices that occurred led to public outcry and countless protests (Adam & Booth, 2018) which contextualizes the importance of the work being done here. These perpetrators' crimes, and their victim's stories, demonstrate the importance of examining the prosecution of sexual assault cases.

The now worldwide #MeToo Movement has grown to empower survivors to come forward and speak up about the sexual abuse and harassment that is pervasive yet often hidden. The #Me Too organization was founded in 2006 and its vision is “to address both the dearth in resources for survivors of sexual violence and to build a community of advocates, driven by survivors, who will be at the forefront of creating solutions to interrupt sexual violence in their communities” (History and Vision, 2018). Originally aimed towards African American women and other women of color, the

movement has recently grown with its strength in numbers. Now, there are diverse survivors of all races, sexual orientations, and others who may face discrimination, that are coming forward with their stories of sexual violence. It is the goal of the #MeToo movement to help uncover how prevalent the problem of sexual assault is and to try and put an end to it. The movement has shed light on the sheer magnitude of this problem and its importance to society.

The true prevalence of sexual assault may be obscured by the fact that the vast majority are unreported, yet self-report data reveal substantially higher prevalence rates compared to official reports (Morgan & Kena, 2018). Statistics show that one in five women and one in 71 men are the victim of a sexual assault during the lifetime (National Sexual Violence Resource Center, 2018). Prevalence rates of sexual assault varies across studies due to a number of reasons, including fear of victim reporting (James & Lee, 2015; Krivoshey, Adkins, Hayes, Nemeth, & Klein, 2013) and the way in which sexual victimization is measured (single vs. multi-item measures; Brubaker, Keegan, Guadalupe-Diaz, & Beasley, 2017; Subotnik, 2018). Nearly 90% of women who are victims knew their attacker, either as an intimate partner or an acquaintance (National Sexual Violence Resource Center, 2018). Furthermore, very few sexual assault cases are prosecuted (Alderman & Ullman, 2012; Darwinkel, Powell, & Sharman, 2015; Darwinkel, Powell, & Sharman, 2013).

Given the overwhelming prevalence and increased public attention to the prosecution of sexual assault cases, the current study aims to identify the characteristics prosecutors perceive to be important when deciding whether or not to take a sexual assault case to trial. To examine the perceptions of prosecutors, the current study

analyzes interviews conducted with 30 Los Angeles deputy district attorneys (Spohn and Tellis, 2014). The following chapters will provide a comprehensive review of the literature related to prosecutorial decision making in sexual assault cases (Chapter 2), describe the current study's research methodology (Chapter 3), provide the results of the analysis of the interviews from the deputy district attorneys (Chapter 4), and conclude with a final discussion, limitations of the studies, and future research opportunities (Chapter 5).

CHAPTER 2

REVIEW OF THE LITERATURE

[Not only is sexual assault unlikely to be reported to the police, but very few cases are prosecuted or end in conviction. One of the major problems associated with lack of prosecuting sexual assault cases is attrition. Attrition has been defined as “the ‘loss’ of cases within the criminal justice chain, especially from police to conviction level” (Jehle, 2012, p.145). Because the data from this present study were originally collected in Los Angeles, California, providing attrition rates from that area may prove useful to better understand attrition in the area being studied. From January 2005-December 2009, only 591 (~12%) of 5,031 sexual assault reports resulted in the offender being arrested. Further, charges were filed in 486 (~82%) cases of the 591 that resulted in arrest. Ultimately, 232 of the 5,031 (4.6%) cases resulted in some form of punishment (i.e. probation, prison, jail) for the offender (Spohn & Tellis, 2014). Opposingly, the Los Angeles District Attorney’s office filed charges in 82.2% of cases during the same time frame, and the conviction rate was 80.2% (Spohn & Tellis, 2014).

Sexual assault cases are often plagued by “rape-myths,” meaning the misconception that the victim somehow contributed to his or her own attack in a way that leads to victim blaming – and rape myths may influence police decisions (Jehle, 2012). Essentially, rape myths are “prejudicial, stereotyped, or false beliefs about rape, rape survivors, or rapists” (Baugher, Elhai, Monroe, & Gray, 2010). Rape myths can target the victim; for example, that women wore sexually revealing clothing or put themselves in unreasonably risky situations that led to their victimization. There can also be rape myths that aim to excuse offenders’ behavior, such as men not being able to control themselves

sexually (Baugher, Elhai, Monroe, & Gray, 2010). Rape myths may influence how prosecutors make decisions about cases. For example, in a case where rape myths are present (e.g. the victim's clothing could be perceived as provocative), a prosecutor may have concerns about how the jury will perceive the victim's credibility.

As will be discussed further in the following section, prosecutors rely on a multitude of factors for other possible explanations for sexual assault case attrition. For example, attrition may pertain to the reality that prosecutors are pressured to have high conviction rates (O'Neal, Tellis, & Spohn, 2015; Spohn & Tellis, 2014). For example, prosecutors often file charges in cases they believe have a high likelihood of conviction and reject charges in which conviction appears low (Spears & Spohn, 1997). Prosecutors' concerns about cases with weaker evidence may also diminish their ability to get a conviction. This means that prosecutors are likely to let a case go if they assess there is not enough evidence to increase convictability. Lastly, prosecutors may also be concerned that key witness(es) may be unable to present reliable, consistent, and convincing reports (e.g. have high perceived credibility) (Beichner & Spohn, 2005; Campbell, Patterson, Bybee, & Dworkin, 2009; Darwinkel, Powell, & Tidmarsh, 2014; O'Neal, Tellis, & Spohn, 2015).

Empirical evidence supports high attrition among sexual assault cases. For example, of the approximately 37% of sexual assault cases that get reported to the police, a very small percentage move forward to the prosecutorial stage (Alderman & Ullman, 2012; Darwinkel, Powell, & Sharman, 2015; Darwinkel, Powell, & Sharman, 2013; Frazier & Haney, 1996). It was found that of 465 sexual assault cases reported to a Midwestern police department, only 9.7% (n=45) moved forward with prosecutors

approving felony charges (Alderden & Ullman, 2012). Similarly, Frazier and Haney (1996) found that only about 40% of sexual assault cases reported to police resulted in an arrest and fewer than 10% of reported cases led to prison sentences (Alderden & Ullman, 2012). This means a high percentage of perpetrators go free and victims do not receive justice.

Another reason for this injustice is because the criminal justice system functions as a group of *systems*. There are many different actors that victims and offenders encounter in the criminal justice process. Offenders are arrested by police, charged by a prosecutor, and convicted by a judge or jury represent all different systems. And these systems often do not flow smoothly between one another (Pfaff, 2017). One consequence of the way the criminal justice system is constructed pertains to the power that prosecutors have over the cases that are prosecuted. In other words, prosecutors have “unfettered, unreviewable power to determine who gets sent to prison and for how long” (Pfaff, 2017, p. 70). This means that prosecutors are the criminal justice “gatekeepers” given that they are on the front-lines of interacting with offenders and victims – and deciding which cases to pursue and which to drop.

While some studies have examined the influence of law enforcement on the decision to move forward in sexual assault cases or not (Alderden & Ullman, 2012; O’Neal, 2015; Tasca, Rodriguez, Spohn, & Koss, 2013), more attention has been devoted to prosecutorial decision making in sexual assault cases (Alderden & Ullman, 2012; Darwinkel, Powell, & Sharman, 2015; O’Neal & Spohn, 2017). There is value in studying prosecutors given the influential power that they have over which criminal cases are processed within the criminal justice system. Therefore, expanding the literature on

the topic will fill an important gap. The following section discusses previous research on the decision to prosecute sexual assault cases.

Prosecutorial Decision-Making

The main focus of this study is to examine prosecutorial decision-making in sexual assault cases. The following discusses the factors that apply to all criminal cases which impact prosecutorial decision making, followed by factors of sexual assault cases specifically.

Case convictability.

Convictability refers to different attributes prosecutors look for to ensure that they pursue cases where receiving a conviction is most likely to occur and reject cases where a conviction is unlikely (Beichner & Spohn, 2005; Frazier & Haney, 1996; O’Neal, Tellis, & Spohn, 2015; Spohn & Holleran, 2001; Spohn & Tellis, 2014). In most prosecutors’ offices, the filing standard is proof beyond a reasonable doubt. Typically, this refers to a legal standard that must be met to find a defendant guilty. However, there is no legal definition that has been set by the Supreme Court, with some jurisdictions having no standard definition, while other jurisdictions can continuously switch their definition as they see fit (Shealy, 2013).

Using Frohmann’s definition, convictability is the “‘downstream orientation’ by which prosecutors attempt to predict the likelihood that a case will proceed through the criminal justice system” (Alderden & Ullman, 2012, p. 528). A “downstream orientation” refers to the “anticipation and consideration of how others (i.e., jury and defense) will interpret and respond to a case” and how prosecutors typically orient towards the jury

(Frohmann, 1997, p. 535). Frohmann also studied “discordant locales” which are defined as “prosecutors' categorizations of places and the people associated with them that they encounter in the work of case prosecution” (Frohmann, 1997, p. 552). To explain further, discordant locales are physical locations that the jurors are not typically from, and therefore, they may have a difficult time understanding the victim’s behavior. Prosecutors use factors such as local activities, resident lifestyles, and ideologies of race and class to generate a locale. They may also use the morals, values, and behaviors of the citizens in these locales. If these locales are “discordant”, victims who live in these areas have a decreased likelihood of prosecutors taking on their case. This is because there are too many factors that would not lead to a conviction (Frohmann, 1997).

Convictability is very important to prosecutors because they do not want to take cases they believe will lose in court. This further relates to the theory of uncertainty avoidance which says that when “controlling for legal and extralegal variables, case information that decreases uncertainty concerning victim/witness management will increase the probability of continued prosecution” (Albonetti, 1986, p. 623). Legal factors are those that attorneys are allowed by law to take into account in deciding whether to prosecute (Beichner & Spohn, 2005). Extra-legal factors are legally irrelevant but still impact cases and prosecutorial decision-making (Colon, Kavanaugh, Hummer, & Ahlin, 2018; O’Neal, Tellis, & Spohn, 2015). There are many factors that work together to influence convictability, such as the seriousness of the crime (Alderden, Cross, Vlajnic, & Siller, 2018; Seyller, Denis, Dang, Boraud, Lepresle, Lefevre, & Chariot, 2016), the strength of the evidence (Alderden & Ullman, 2012; Darwinkel, Powell, & Sharman, 2015; Spohn, Beichner, & Davis-Frenzel, 2001), and the availability of witnesses

(Alderden & Ullman, 2012; Darwinkel, Powell, & Tidmarsh, 2014; Westera, Kebbell, & Milne, 2013). These will be discussed further in the following section, but it is crucial to understand their importance early on as a guideline to see what leads to successfully convicting sexual assault cases.

Legal and Extra-Legal Factors

Legal factors are those that attorneys are allowed by law to take into account in deciding whether to prosecute. Legal factors are the primary determinates of convictability (Beichner & Spohn, 2005). Some examples of legally relevant factors include: seriousness of the offense, strength of evidence, and culpability of the defendant. Many cases are rejected by prosecutors due to lack of physical evidence, or the evidence in question is not sufficient to prove the case beyond reasonable doubt (O’Neal, Tellis, & Spohn, 2015). Other legal factors that may influence prosecuting decisions are corroboration of the victim’s allegations and the victim’s willingness to cooperate with the investigation and prosecution of the case. O’Neal, Tellis, and Spohn (2015, p. 1246) found that all cases that were filed by prosecutors included at least one piece of evidence, including: “one or more witnesses. a forensic medical examination, physical findings, or documented collateral injuries to the victim.” However, in many cases relevant legal factors are not always known. This is particularly common among sexual assault cases because victims often wait to report to police so physical evidence is no longer available (Cashmore, Taylor, & Parkinson, 2017; Lanthier, Du Mont, & Mason, 2018). In the absence of legal factors, a prosecutor can only use extra-legal factors when building the case.

Extra-legal factors are legally irrelevant and include examples such as victim and offender history, and victim behavior; factors such as these are not unlawful, but they may impact a sexual assault case (Colon, Kavanaugh, Hummer, & Ahlin, 2018; O’Neal, Tellis, & Spohn, 2015; Spohn & Holleran, 2001; Spohn & Spears, 1996). Other extra-legal factors that impact prosecutor charging decisions include the relationship between the victim and the attacker and the location of the crime. O’Neal, Tellis, and Spohn (2015) found that in approximately 57% of the cases that resulted in the filing of charges by prosecutors, the victim and attacker were either married couples or former dating partners. This study also found that most sexual assaults take place in the victim’s residence, the attacker’s residence, or a shared residence which impacts credibility if a jury believes the victim knew her attacker or willingly entered the location in which the attack occurred. Cases with a lack of evidence, or cases that did not meet the standard of proof beyond a reasonable doubt, were likely to get rejected by prosecutors. Also, extralegal factors, such as social-economic status, race, and gender, were important in determining convictability (O’Neal, Tellis, & Spohn, 2015). Spohn and Holleran (2001) examined different victim/offender relationships—strangers, acquaintances/relatives, and intimate partners—and how extra-legal characteristics, such as race, were conditioned by one another. This study found that in sexual assault cases where the victim and offender were strangers, prosecutors were 4.5 times more likely to file charges when the victim was white, compared to non-whites. Interestingly, victim characteristics only affected charging decisions when there was a non-stranger relationship between the victim and offender, except for race (Spohn & Holleran, 2001). Regardless of the relationship

between the victim and offender, physical evidence present during the investigation greatly improves the odds of a prosecutor taking the case.

It has been ascertained that convictability and various legal and extra-legal factors impact prosecutorial decision-making, specifically as it pertains to sexual assault cases (Beichner & Spohn, 2005; Colon, Kavanaugh, Hummer, & Ahlin, 2018; O'Neal, Tellis, & Spohn, 2015; Spohn & Holleran, 2001; Spohn & Spears, 1996). When it comes to convictability, prosecutors want to take cases they believe they can win because they want to maintain a high conviction rate. Legal and extra-legal factors either improve or tarnish convictability depending on the strength or weakness of the factor. The following section breaks down these different factors and what previous literature has found as it relates to prosecutorial decision-making.

Legal Factors

Evidence.

One of the primary determinants of charging decisions is the strength of evidence in the case (Albonetti, 1987; Alderden & Ullman, 2012; Beichner & Spohn, 2005; Darwinkel, Powell, & Sharman, 2015; Frazier & Haney, 1996; Kerstetter, 1990; Konradi, 1997; Spohn, Beichner, & Davis-Frenzel, 2001). One study, for example, found that prosecutors were eight times more likely to approve felony charges when there was physical evidence of victim injury, compared to victims who sustained no injuries or in which there was no evidence of injury (Alderden & Ullman, 2012). Also, as the severity of the injury to the victim increases, the seriousness of the case increases. To put it another way, the more injured a victim, the better the chance of receiving a conviction at trial (Alderden & Ullman, 2012).

Similarly, exculpatory, corroborative, and physical evidence all impact the likelihood of going to trial (Albonetti, 1987). Exculpatory evidence pertains to any evidence that could clear the defendant of blame, which would decrease the likelihood of a trial (Albonetti, 1987). Oppositely, corroborative evidence reduces ambiguity around prosecutors' decision to charge based on legally relevant factors. Lastly, the strongest factor is physical evidence which reduces uncertainty and increases confidence in the fact that a crime did occur (Albonetti, 1987).

Corroboration and reasonable doubt.

Cases in which the victim's allegation can be corroborated by other people (e.g., witnesses) are also more likely to result in charging and pursuing the trial (Alderden & Ullman, 2012; Darwinkel, Powell, & Tidmarsh, 2014; Lievore, 2004; Westera, Kebbell, & Milne, 2013). However, most states have eliminated the requirement for corroboration in sexual assault cases. This is because even if a victim is presumed credible, requiring corroboration is assuming that the victim is lying about her assault (Gruber, 2018). Also, the use of an eyewitness as corroboration has proved beneficial, but in most cases, witnesses are usually not bystanders as a sexual assault is occurring, making corroboration impossible (Gruber, 2018). Corroboration pertains to both physical factors, like evidence produced from forensic medical exams, and non-physical factors, such as the presence of witnesses who can verify information provided by the victim (e.g., witness hearing the victim saying "no" or "stop"). Preliminary court hearings are used to determine reasonable doubt. Reasonable doubt is based on factors such as enough evidence is presented, and proving an alleged suspect committed the crime. Lack of witnesses or evidence decreases reasonable doubt and therefore, decreases convictability

(Alderden & Ullman, 2012). Understanding how prosecutors from the present study view the importance of corroboration will increase the overall perception researchers have about how this factor impacts prosecutorial decision-making.

Extra-Legal Factors

Victim credibility.

Victim credibility pertains to the quality of the victim being believable in front a jury. Victim credibility has consistently been found to be an important characteristic for prosecutors when determining whether or not to move a sexual assault case forward (Beichner & Spohn, 2005; Campbell, Patterson, Bybee, & Dworkin, 2009; Darwinkel, Powell, & Tidmarsh, 2014; Frazier & Haney, 1996; Konradi, 1997; Lievore, 2004; O’Neal, Tellis, & Spohn, 2015; Rose & Randall, 1982). Credibility falls in between the lines of legal and extra-legal and can go towards both. For example, if a victim was known to be sober before the attack, this improves her mental state and memory which is legally relevant. However, if the victim was drinking before the attack and is “victim-blamed”, this is not legally relevant. Taken together, the literature illustrates that victim credibility is one of the most important factors for prosecutors when determining the likelihood that a sexual assault case will result in a conviction. While they will be discussed in further detail below, some examples of what builds victim credibility are: victim behavior, corroboration of story, and consistency in victim’s story.

Once sexual assault cases are selected for prosecution, prosecutors may prepare the victims from cases they choose to take on. Prosecutors want to transform victims into “good” credible witnesses so victims will be perceived by the jury and judge as believable in court, which increases the likelihood of a guilty verdict (Konradi, 1997).

Victim credibility can come from the victim themselves, such as truthfulness and corroboration of their story by means of the availability of a witness, but it can also come from prosecutors by demystifying rape myths. By teaching what rape myths are and giving examples, juries may still hold victims credible, even if they were displaying some of these “rape myths” at the time of the attack. Some ways to increase victim credibility include: preparing victims before trial by having victims read over reports (e.g., police report), reviewing victims’ accounts of the assault, and including specific information in victims’ testimonies before trial (Konradi, 1997). Because victim credibility has been found to be one of the most important characteristics for prosecutors in developing a strong case, assessing good credibility leads to an increased likelihood of the case moving forward and receiving a prosecution of the accused. On the other hand, there are ways in which a victim can lose credibility and decrease the likelihood of a trial.

Losing victim credibility.

Some of the possible reasons that a victim may lose credibility is if they behave in ways that conform to commonly-held social stereotypes and display certain emotions, or show no emotion, and this only perpetuates rape-myths. When a victim behaves in ways consistent with stereotypes, they display actions that reduce credibility. For example, a stereotype of African American women is that they are hyper-sexual, and if this stereotype is used against the victim in a sexual assault case, the victim may lose credibility (Konradi, 1997). This means a defense attorney may use the negative stereotype of the victim during the trial to persuade the jury to believe the defendant. Similarly, people tend to be viewed as genuine victims if their behavior appears respectable, such as not drinking or drug-using before the attack, and fighting back with

the evidence to prove it (Schuller, McKimmie, Masser, & Klippenstine, 2010). Victims displaying unfavorable or risky behavior can lead to rape myths. People who accept rape myths tend to be more likely to blame the victim if she accepted, rather than rejected, a drink from her attacker (Romero-Sanchez, Krahé, Moya, & Megías, 2018).

Displaying emotions, or a lack thereof, is another way that victims may lose credibility in their sexual assault case. For example, displaying anger has been interpreted as the victim having something to hide (Lens, van Doorn, Pemberton, & Bogaerts, 2014). Another way a victim can lose credibility is through complete lack of emotion. On the other hand, there are some emotions which are appropriate to display and may help the case (Konradi, 1997; Peace, Porter, & Almon, 2012). For example, tears or other visible manifestations of fear or pain were helpful in reinforcing victim credibility (Konradi, 1997). The “emotional victim effect” explains that victims who are emotionally expressive are more likely to be seen as credible in comparison to victims who show no emotion because juries have expectations about how victims experience and react to abuse (Klettke, Hallford, & Mellor, 2016). Overall, certain emotions can be useful in sexual assault cases (e.g., crying or other feelings of fear or pain), while other emotions (e.g., anger or a flat affect) can negatively influence the prosecution.

Victims are perceived as less credible and less likely to answer questions accurately when questioning was closed and leading, compared to open questioning during police interviews. Closed questioning is often used when leading the victim to give a specific answer which may leave off important details (i.e., “what were you wearing on the night of the incident?”). Open questions give room for the victim to tell the full story (i.e., “what happened on the night of the attack?”). When prosecutors are

examining statements victims give the police, some of the more important characteristics for determining whether to prosecute or not were increased accuracy, detail, and completeness of the complainant's testimony (Westera, Kebbell, & Milne, 2013). Closed and leading questions have been shown to lead the prosecutor to believe the victim is less accurate and less credible, compared to when questions were open. Because of this, interviews with victims in which questions were closed were less likely to be recommended for police charge by prosecutors (Westera, Kebbell, & Milne, 2013). For example, closed-ended questions lead to less elaborative reports and pose other issues such as increasing inconsistencies and suggesting information. Close ended questions may actually negatively affect credibility because they create issues in the victim's narrative. The type of questioning by police can quickly impact how juries view the complainant. Therefore, open questioning by police give victims the best opportunity to appear credible and give prosecutors a better opportunity of winning the case.

A victim may also lose credibility if false or inconsistent claims are detected at any point during the prosecution process (Alderden & Ullman, 2012; Lievore, 2004; O'Neal, Tellis, & Spohn, 2015). When it comes to inconsistent reporting, detail reporting and confusion about the timing, place, sequencing of events, and who else was there, etc. can negatively influence credibility but does not necessarily mean it is a false report, but it may still impact the convictability of the case.

However, there have been rare instances in which prosecutors put in the time and effort to prepare a case, only to find out that the sex was consensual, and the case is no longer valid. Similarly, there are times when women will file false claims against an intimate partner for revenge. While one study shows that police officers often question

the accuracy of sexual assault reporting (Venema, 2018), other studies show that false reports are extremely rare (Belknap, 2010; Spohn, White, & Tellis, 2014). For example, Belknap (2010) found that less than 1% (0.005%) of reports filed to the police were false. Another study found 4.5% of the cases reported to the Los Angeles police department alone were deemed false (Spohn, White, & Tellis, 2014). While all cases must be considered seriously, prosecutor's perceived inaccuracies in a victim's story can severely impact victim credibility and causes trust issues for future victims with legitimate claims (Campbell, Menaker, & King, 2015).

Lastly, it has been found that if the defense had any material that could discredit the victim, such as psychiatric history, the case would most likely be discontinued (Lievore, 2004). A majority of United States jurisdictions often allow psychiatric evidence into trials, even if such evidence was collected inaccurately or through outdated methods (Wilkinson-Ryan, 2005). Even so, juries are likely to implicitly take this information into account and use the victim's psychiatric history against her and reduce her credibility (Ellison, 2009; Wilkinson-Ryan, 2005). Unfortunately, there does not appear to be many studies which thoroughly exam the psychiatric history of victims and how that is used as evidence in a sexual assault trial, even though it does seem significant in the studies that have examined it. Victim credibility is an important characteristic for prosecutors when examining sexual assault cases. Yet there are many ways that victims can lose credibility, and understanding what is effective can greatly improve the likelihood of receiving a successful prosecution. For example, victim behavior has shown to impact sexual assault prosecutorial decision-making in both positive and negative ways.

Victim behavior.

Victims may also lose credibility by participating in risk-taking behavior before or after the sexual assault occurred (i.e., drinking or using drugs) or if their moral character was in question as this could lead to the jury “victim-blaming,” which makes prosecution less likely (Campbell, Menaker, & King, 2015; Frazier & Haney, 1996; Henning & Feder, 2005; Lievore, 2004; Rauma, 1984; Rose & Randall, 1982; Spohn, Beichner, & Davis-Frenzel, 2001; Spohn & Spears, 1996). Specific examples of victim behavior that may influence a prosecutor’s decision to pursue a case include prior convictions or arrests, a history of prostitution, and alcohol and/or drug use at the time of the alleged offense (Campbell, Menaker, & King, 2015). Furthermore, these scholars found that police officers were likely to look into the victim’s behavioral and moral history when studying a sexual assault case. If there was no corroboration, victim credibility was the most important factor to investigators (Campbell, Menaker, & King, 2015). If the officer found that the victim had been heavily drinking or using drugs prior to the attack, then the officer was likely to be more apprehensive in believing the victim and was less likely to charge the defendant. Similarly, 31% of officers investigated victims’ criminal history and said in their interviews that it impacted credibility and convictability. Victims often understand the consequences of their questionable behavior on their culpability, which may cause victims to lie to police or disclose only part of the information (e.g., flirted with the offender or had been drinking at the time of the attack; Campbell, Menaker, & King, 2015). Interestingly, victim behavior has been found to be a more significant predictor in charging decisions compared to tangible evidence—and risk-taking behavior could be something as benign such as walking alone at night

(Beichner & Spohn, 2005). While victim-blaming is not accepted socially, it may impact the likelihood of conviction. Victim behavior is an example of an extra-legal factor, rather than a legal one, and these are both important to prosecutors when they determine if they should take a case or not.

Victim cooperation.

Victim cooperation is a major factor in whether or not prosecutors choose to pursue the case (Dawson & Dinovitzer, 2001; Frazier & Haney, 1996; Henning & Feder, 2005; Kaiser, O’Neal, & Spohn, 2017; Lievore, 2004). However, some victims do not want to cooperate with the criminal proceedings because they do not want to keep recounting the experience or may feel pressure from their family and/or friends to withdraw cooperation (Dawson & Dinovitzer, 2001; O’Neal, 2017). They may also fear the negative consequences of pressing forward like retaliation, decreased social support, and the negative effects on their reputation. Victim cooperation in sexual assault cases has previously been assessed using the focal concerns perspective. The focal concerns perspective was originally developed to explain decision-making for judges but has since expanded to explain prosecutor and police decision-making (Kaiser, O’Neal, and Spohn, 2017). To further explain, criminal justice personnel (police, prosecutors, and judges), use their discretion to choose which aspects of a case are most important and use that to their advantage, while dismissing the other aspects that may not be as helpful to them (Campbell & Fehler-Cabral, 2018). There are three concerns that this perspective is guided by: (1) the assessment of the blameworthiness of the offender, (2) the desire to protect the community by incapacitating dangerous offenders or deterring potential offenders, and (3) the concerns about the practical consequences, or social costs, of

sentencing decisions. The three *victim* focal concerns are crime seriousness, the costs of cooperation, and the likelihood of conviction, and how these impact the odds of victim cooperation (Kaiser, O’Neal, & Spohn, 2017). If the victim feels like a prosecutor thinks the crime is serious enough and there is a high likelihood of conviction, then cooperation is more likely. There is support for developing victim cooperation using this perspective and there are ways to increase cooperation. An important factor that increases victim cooperation before even interacting with prosecutors concerns the rapport that police officers establish with victims (Kaiser, O’Neal, & Spohn, 2017). Overall, by addressing the concerns that are present in the focal concerns’ perspective, victim cooperation is likely to increase, which helps prosecutors increase the likelihood of conviction in sexual assault cases (Kaiser, O’Neal, & Spohn, 2017). Prosecutors try to overcome victims’ reluctance to proceed but cannot force a victim to give evidence because prosecutors are generally aware of potential revictimization when going through an arrest, trial, and sentencing (Lievore, 2004).

Victim cooperation is one of the greatest influencers on prosecutors’ decision to take a case or not. When victims are perceived by prosecutors to be cooperative, the likelihood of their case being prosecuted increases *seven times* compared to those who are not perceived to be cooperative (Dawson & Dinowitzer, 2001). Further, this research found that the availability of videotaped testimony and meetings between victims and assistance workers were the two most important elements of victim cooperation. Videotaped testimony can theoretically explain victim cooperation because when prosecutors see that the victim does not mind being taped, they are perceived by prosecutors to be more cooperative. Victim and assistance workers may also increase

victim cooperation by providing victims with the support they need to get through the trial. While Dawson and Dinowitzer (2001) focused on domestic partners, little is known about victims who are not intimates, which is discussed further on in this thesis. In other words, victim advocates appear to increase victim cooperation given that they provide support for victims, help victims prepare for trial, communicate with victims throughout the case, describe court settings, and help victims understand different plea bargains (Gaines & Wells, 2017). The information and support provided by victim advocates often makes it possible for victims to understand the proceedings during the trial in an effort to decrease additional stress victims may experience from the prosecution process. Another stressor victims face is the complications from knowing the attacker. Prior relationships between victims and attackers impacts victim cooperation and the likelihood of prosecution compared to stranger attacks.

Victim/Attacker relationship.

Evidence regarding the effect of the victim/suspect relationship on charging decisions is somewhat mixed. However, much of the literature indicates that if the victim knew the attacker, prosecution is less likely to occur (Alderden & Ullman, 2012; Beichner & Spohn, 2005; Spohn, Beichner, & Davis-Frenzel, 2001; Spohn & Holleran, 2001). This has been explained, in part, by Black's Theory of Law (1976). The main purpose of this theoretical framework is to address the differences in how police handle sexual assault cases between whites and non-whites. Also, in his work, Black examined the victim/offender relationship by saying that the stronger a relationship is between the victim and the offender, the less likely it is to be reported (Yang, 2016). For example, one

study found that the likelihood of felony charges decreased by 98% when the victim knew the suspect, compared to if the victim and suspect were strangers (Alderden & Ullman, 2012). However, victims fear retaliation from those who they know for many reasons. They also might feel greater guilt when they know the perp, or sometimes they may care for the perpetrator and not want bad things to happen to him. Another for this phenomenon relates to a higher quality police investigation among cases perpetrated by a stranger. In other words, some evidence suggests that police conduct a more rigorous investigation among crimes perpetrated by strangers (Alderden & Ullman, 2012). And cases that are investigated more rigorously by police are more likely to be prosecuted because prosecutors believe there is more evidence to build a stronger case against the accused (Alderden & Ullman, 2012).

Relatedly, there were exemptions on cases involving marital rape in many states until recently (Decker & Baroni, 2012). In the case *People v. Brown*, the state of Colorado said that there was a rational reason for differentiating sexual assault cases involving strangers compared to cases involving spouses. The explanation was that there could have been a possibility of spouses to reconcile, or that it brings up questions about emotional issues within the relationship and problems with reasonable doubt (Decker & Baroni, 2012). There is only one other state that allows for a marital rape exemption (North Carolina) even though it has been shown that people who offend against partners are also likely to offend against strangers, therefore making the marital exemption law meaningless (“Married to the Past”, 2015).

Furthermore, if a prior relationship between the victim and suspect can be established, this increases the likelihood that the case will be dismissed. A prior

relationship also decreases the probability of a defendant being convicted, the odds of incarceration, and the length of the sentence, if the case goes to trial (Spohn, Beichner, & Davis-Frenzel, 2001). The differences in sentencing between prior relationship and stranger cases leads to the notion of “real rape” which states there is a difference between a stranger who attacks from the dark with a weapon (i.e. “aggravated rape”) compared to an acquaintance or partner who attacks (i.e. “simple rape”) (Kenney, 1989). Aggravated rape is more likely to proceed to trial because it is seen as more “real” and serious (Kenney, 1989). Overall, the majority of studies show that a relationship between the victim and the suspect does negatively impact prosecutorial charging decisions (Alderden & Ullman, 2012; Beichner & Spohn, 2005; Spohn, Beichner, & Davis-Frenzel, 2001; Spohn & Holleran, 2001).

Summary of the Factors That Impact Convictability

Overall, prosecutors’ willingness to take a case to trial comes down to the many factors previously discussed. These factors include: victim credibility, corroboration, physical evidence, the victim/attacker relationship, convictability, victim behavior, and victim cooperation. However, there is still more research that needs to examine predictive factors of successful prosecution and how that can be used to help future victims. The gaps in the literature are how these variables interact with one another. For example, it has not been studied how victim behavior and availability of physical evidence impact a case together. Further, if the behavior of the victim predicts high convictability but there is no physical evidence, how does the prosecutor interpret this; and all factors discussed above can be researched as interactions. These have been studied as separate entities

within one study, but interactions between the two, and other factors, have not. Also, there is no research that examines the decisions prosecutors must make throughout the entire process of a sexual assault case. Currently, research examines prosecutorial decision-making as it relates to working with the police, or as it impacts convictability, or affects the dismissal of charges, but no studies have looked at all of these together. The current study aims to fill these gaps by examining a topic which has not been studied before—prosecutorial decision-making over three time periods. These stages include factors that persuade a prosecutor to take a case rather than reject it, factors that improve case outcomes, and factors which would lead to a dismissal of charges. It is important to examine these characteristics individually and in terms of how they interact with one another to better understand prosecutorial decision-making in sexual assault cases. There is much research regarding prosecutorial decision-making so going more in-depth can only improve understanding. Given the time, resources, and energy involved in each case, prosecutors do not want to pursue cases that they believe are unlikely to result in a conviction.

CHAPTER 3

METHODOLOGY

The aim of the present study is to examine the characteristics prosecutors perceive to be influential for the successful prosecution of sexual assault cases and what causes attrition in other sexual assault cases. This study uses secondary interview data of prosecutors originally collected by Dr. Cassia Spohn of Arizona State University and Dr. Katharine Tellis of California State University, Los Angeles. The purpose of the original study was to examine the characteristics perceived to be important to deputy district attorneys for the successful prosecution of sexual assault cases.

Data Collection

This study uses data that were originally collected using a mixed-method approach (Spohn & Tellis, 2014). Both quantitative and qualitative data were collected on sex crimes that were reported to the Los Angeles Police Department (LAPD) and the Los Angeles Sheriff's Department (LASD). For the purposes of the current study, the qualitative data will be examined from interviews with deputy district attorneys (n=30). All the interviews were conducted between June and July of 2010, and the responses were recorded in a text file. While the overall sample size was thirty, due to the interviews being conducted in a more informal manner, not all questions had a 100% response rate; for example, a question measuring victim credibility only had 17 responses.

Prior to beginning any research on the subject of prosecutorial-decision making so as to not create a bias, the interview notes were coded to extract themes. To do so, each question and its responses were read one at a time with key words being highlighted and

a tally was taken to assess how many times attorneys gave that answer. The more times a key word was mentioned, the more it became an overall theme to the question.

Hypotheses from this study were formed through inductive reasoning where interviews with the prosecutors provided greater knowledge on the general principle of prosecutorial decision-making. This method is rooted in grounded theory which says that theory comes from generating, testing, and refining data, and that theoretical constructs can be based upon individuals and their everyday use of these constructs (Jupp, 1989). While there are some limitations to using this method, such as qualitative research being difficult to move beyond making generalizations based on specific contexts, there is still validity in this.

Sample

The sample used in this study consists of interviews with deputy district attorneys (n=30). The Deputy District Attorneys were located within twelve different locations, including courthouses and offices, across Los Angeles. The locations were selected for inclusion in the study if the research team determined them to be representative of the general majority of sexual assault cases that come through the criminal justice system (Spohn and Tellis, 2014). Attorneys also worked in the Family Violence Division of the District Attorney's Office. The number of years that those interviewed had been prosecuting attorneys ranged from three to twenty-three years with an average of 11.7 years. The number of years attorneys had been prosecuting sex crimes specifically ranged from one to twenty-three years with an average of 5.6 years.

As part of the policies and procedures that must be followed at the district attorney's office, prosecutors were required to interview victims prior to filing charges in any case (Spohn and Tellis, 2014). Also, police and prosecutors work closely together

during this time and often, the police will hold off on making an arrest so that prosecutors can complete a pre-filing evaluation which gives the attorneys time to see if enough evidence is present for them to make a conviction with proof beyond a reasonable doubt. The main reason for this is that once an arrest is made, prosecutors have 48 hours to file charges, so they want to make sure conviction is likely (Spohn and Tellis, 2014). This begins to give context to what the prosecutors in this sample look for and why they look thoroughly before making any decisions.

Measures

The outcome of interest focuses on prosecutors' perceptions of factors related to (1) the initial decision to prosecute sexual assault cases, (2) the process of pursuing successful cases, and (3) the dismissal of cases. Success was defined as a trial that ends with a conviction of the suspect, rather than the case being dismissed or the suspect being found not guilty. These different measures can be seen through a graphic flowchart which is seen below on the following page. The chart depicts the three different stages described above and is a guideline to provide visual clarification of these steps.

The initial decision to prosecute sexual assault cases. When presented with a case, prosecutors must first decide whether or not to pursue the case. To answer this question, prosecutors were asked: "Studies have shown that there is a high rate of case attrition in sexual assault cases. What accounts for this?" Further probative questions were then asked, including: "In your experience, which types of sexual assaults are least likely to result in successful prosecution?". The next question was: "Which types are most likely to result in successful prosecution?"

The process of pursuing successful cases. Next, this study examines factors that

lead prosecutors to keep moving forward with, or what may lead them to drop, the cases they choose to take on. This includes factors such as probable cause, DNA evidence, and victim credibility. To answer the question of what factors incline attorneys to move forward with a case, prosecutors were asked:

- 1) Are charging decisions in sexual assault cases based on a standard of probable cause, proof beyond a reasonable doubt, or something else? Will you file charges if all of the legal elements of the crime (penetration, lack of consent, force) are present or do you evaluate the case based on the likely outcome if the defendant is tried before a jury?
- 2) Are there any types of cases where you would file charges even though you believed that the likelihood of conviction was low?
- 3) What factors do you take into account in deciding whether to file charges or not in a sexual assault case? What factors would incline you to reject the case?
- 4) How often does DNA evidence come into play in these cases? Are jurors looking for DNA evidence in sexual assault cases?
- 5) Studies also have shown that the credibility of the victim plays a role in sexual assault case processing decisions. How do you evaluate victim credibility?
- 6) What leads you to question whether the victim is telling the truth?
- 7) What role does use of drugs or alcohol by the victim and/or the suspect play in case outcomes?

These responses give way to what prosecutors perceive to be important in prosecuting sexual assault cases.

The dismissal of cases. Finally, this study examines prosecutors' dismissals a

sexual assault case by asking respondents: “Once sexual assault or sexual battery charges have been filed and the defendant has been bound over for trial, what would lead to dismissal of the charges?”

Plan of Analysis

The aim of this study is to identify factors that prosecutors believe make for a successful prosecution in sexual assault cases. Themes from the prosecutors’ responses to the interview questions were extracted to answer the overall research question of what characteristics deputy district attorneys perceive to be effective to prosecute sexual assault cases. Direct quotations from participants were included for illustrative purposes. The data were examined by hand in which themes were manually extracted as the interviews were reviewed.

CHAPTER 4

RESULTS

The results will follow a chronological timeline in a prosecutor's decision to file charges. First, themes will be presented pertaining to the decisions prosecutors face at the beginning of a case, including factors that influence prosecutors to pursue a case or not. Then, themes will be presented on prosecutors' perceptions of what is needed to receive a successful charge or what will lead to a failure of possibly receiving a conviction once a decision has been made to take a case. Finally, the findings will move into what could lead to a dismissal of charges entirely after charges have been filed. In other words, the findings are organized around three different stages in a prosecutor's schedule. However, all of this occurs before the trial if the case makes it through all the stages leading up to it. General themes and quotes drawn from the interviews will be presented.

Part 1: Decision to Prosecute

After an arrest has been made, the first step attorneys must make is deciding to prosecute or not; there are a couple different factors that should be assessed prior to making this choice. First, prosecutors were asked to explain why the attrition rate is so high in sexual assault cases. A majority of prosecutors that responded to this question (n = 5 of 7; 71%) said that the biggest cause of this is lack of corroboration and lack of the victim reporting the assault. When describing why sexual assault cases are often not filed, one attorney said:

Lack of corroboration so they are never filed. Victims failing to report.... Adults: it's a trying process. You can get them to prelim, but going through it at trial is a difficult psychological process for them. Handholding is a critical part of this.

This illustrates the point that victims may choose not to report the assault due to

the social stigma that is often placed on victims of sexual assault, and particularly if the assailant was a family member. Another prosecutor expanded upon this point in the following quote:

...embarrassment from family itself...often in cases I deal with the victims are victimized by a family member, always male, and they are father figure or breadwinner of the family. And in the area, we prosecute that economic stability of the family isn't the best so if you lose the father who earns money and the child sees the possibility of becoming more poor than they already are they would rather not report.

There are a variety of reasons why attrition is high in sexual assault cases. As illustrated by the above quotes, these are many reasons for case attrition that are out of the hands of prosecutors. However, there are also reasons in which cases may not get filed due to reasons that are within the control of prosecutors. This means that if a prosecutor sees a factor which does not help their case, they are in control of what to do from that point moving forward. One example of something a prosecutor can control is if they chose to take a case or not in which the victim and offender knew each other. Overwhelmingly, one reason for unsuccessful prosecution is due to the victim and the offender knowing one another, or having had some prior relationship. Out of the 21 deputy district attorneys who provided answers to this particular question, 43% (n=9 of 21) listed this as a reason not to file charges. One prosecutor said:

...a lot of our crimes are interrelationships, what I mean is family, stepparents, people that you know, so that's just by nature of being VIP [Victim Impact Program] cases are most difficult. People victimized by people they know and love and trust so those are difficult for everybody; for child because they'll be asked to testify against someone who has both damaged them, yet they also love them...

Some of the other factors that attorneys agreed upon as the least likely to result in a successful prosecution are: age of victim/young child (24%; 5 of 21 asked the

question), no corroboration to the victim's story (24%; 5 of 21 asked the question), and a history of mental illness and/or substance abuse in the victim (29%; 6 of 21 asked the question). One prosecutor commented on the topic of which cases were least likely to result in a successful prosecution by saying:

A victim who is a single victim in the dating age who knows the assailant, date rapes....hardest to prove, we reject the most. [In terms of] Barriers: victim knows the assailant, and victim consented to some part of the relationship, to go on the date, to kissing, to drinking, to taking drugs, and according to victim, defendant took it too far and didn't take no for answer and for jury it's "he said she said" and if victim has already agreed to x and y they have a hard time accepting she didn't agree to z...

The prosecutor quoted above explains that if the victim agreed to kissing or going out for drinks with the alleged offender, then the jury may have a tougher time believing that the victim did not agree to having sex with her attacker.

However, there are also the factors that, when present, help attorneys by increasing the likelihood of a successful prosecution. When asked what factors were the most likely to result in a successful prosecution, 47% of respondents (n=8 of 17) said that cases in which the victim and the offender are strangers are the most likely to result in conviction. One prosecutor illustrated this point by saying:

Stranger assaults from [the] perspective of police officer are hardest to investigate, but from [the] prosecution standpoint those are easiest because any and all corroboration is helpful. [For example,] There is no reason for any touching to have occurred [among strangers]...

The next factor that emerged as most likely to lead to a successful outcome is DNA or physical evidence with 47% of respondents (n=8; 47% of 17 attorneys asked the question) citing this criteria as crucial for a successful sexual assault case. With physical evidence, such as scratches, bruises, broken ribs, etc., and DNA (i.e. semen), there is

more likely to be proof beyond a reasonable doubt that the offender is guilty, which makes prosecutors more willing to take the case. An attorney said:

Whenever physical findings [are identified during] the SART [Sexual Assault Response Team] exam, injuries, tearing, lacerations, [it is a] good thing for us [in terms of prosecution]. Cases where there is DNA and suspect generally denies any sexual contact with the person or denies being anywhere near the person that day...

To summarize, most deputy district attorneys believe that attrition is high in sexual assault cases due to lack of corroboration, lack of victim reporting, victim/offender relationship, and more, as described above. If the case is not automatically dismissed, the next step in the process for attorneys is to take the remaining cases and pursue them for successful prosecution. The following section presents the factors that prosecutors identify as being important for cases to either continue moving forward or be dropped.

Part 2: Process of Pursuing Successful Criminal Cases

The next step in the criminal process is finding factors that will benefit or harm the attorney's chances of receiving a conviction once they have decided to take on a case. Once a criminal case is taken to court, it is up to the jury to make a decision on if the defendant is found guilty or not (Klettke and Powell, 2011; Peters, Lampinen, Malesky, and Kovera, 2013; Tabak, Klettke, and Knight, 2013). To make a unanimous decision, the jury looks at many factors, such as physical evidence, DNA, photos, statements, etc. As the majority of attorneys interviewed in the current study emphasized, there must be proof beyond a reasonable doubt in criminal court. Specifically, when asked if charging decisions were based on a standard of probable cause, proof beyond a reasonable doubt, or something else, the majority (64%; n=9 of 14) said that there has to be proof beyond a reasonable doubt. For example, one attorney said:

We have to believe we can prove this case to a jury beyond a reasonable doubt; has to be based on what a jury would say. Our ethical duty is we cannot prosecute a case we don't think we can prove beyond a reasonable doubt. A lot of "he said she said" cases in a pre-file interview with victim who I truly believe but I don't think I can prove it to a jury. I tell them it's not fair to them to put them through the process if I don't think we can win...

Rarely did prosecutors file charges if they believed that the likelihood of conviction was low. When attorneys were asked if they would choose to file a case even with a low likelihood of successful prosecution, 52% (n=13 of 25) said that they would not. For example, one attorney said:

I'm not going to breach my ethical duty which is to file cases you know you can prove beyond a reasonable doubt. Weakens the system if prosecutors do that [file cases that are unlikely to result in a conviction].

On the other hand, there were some prosecutors (36%; n = 9 of 25) who believed it is their job to protect victims to the best of their abilities, even if they felt the evidence was weak or there was not enough corroboration. One attorney who felt this way said:

Problems with a case do not stop me from filing it. If chance of conviction is not there to the point it would be unethical to file, then I wouldn't. All cases have problems though and the point is to overcome them by being a good attorney

There are many different factors that prosecutors must carefully consider when deciding to file a sexual assault case, even one with weak evidence. For example, the factors that most likely result in a decision to file charges, according to the prosecutors who were interviewed, included: corroboration of the victim's story, no delay in reporting to the police, and physical evidence. The majority of the attorneys interviewed, 57% (n=13 of 23), mentioned that having corroboration was the most important factor in deciding to file charges and that lack of corroboration meant charges were likely not to be filed. One attorney illustrated this point by stating:

Sole thing we are looking for is corroboration. You need all of the elements of the offense and you need corroborative evidence so that's the sole thing: pretext, prior, statement by defendant, DNA/medical evidence. Suspects will talk in about 15% of cases. We file 1 in 20. Trial of those, 1 in 15. They're pleading most often because we have good evidence...

Prosecutors also discussed predictors of what will lead to a rejection of charges.

The key indicators that emerged in the interviews included: victim behavior, lack of victim cooperation, delayed reporting, inconsistent stories, and insufficiency of evidence.

For example, one prosecutor said:

... Jurors are not going to hear just "I said stop, but he didn't". They want to know what was going on, how well they know each other, etc., and often those do not work for the victim, like the girl I spoke of earlier she was flirting, she was drinking, and defense lawyers jump with that, and you get jurors who are less sympathetic or not sympathetic at all. A lot of the cases where girls are drinking too much at parties do not get filed. We have girls who have had multiple partners throughout the evening, and they do not get filed.

The topic of DNA and physical evidence was briefly discussed earlier. The main focus on the earlier discussion of DNA was what factors, in general, make for a successful sexual assault case; and DNA was just one of the many described. Now, more in-depth findings are provided on how DNA plays a role in sexual assault cases. Further, in the first stage where prosecutors decide to take a case or not, they look at what corroboration is available (i.e. DNA). In the second stage, where prosecutors see what factors they have that are beneficial to them in successfully prosecuting, they determine if DNA is available. When asked specifically about how DNA was assessed in these cases, attorneys said that it is always useful but often times not realistic. This is because DNA evidence may not be available due to the time that elapsed between the alleged attack and when the victim reported it. One attorney who showcased this viewpoint said:

Juries have incredibly ridiculous standards about what DNA should do. If DNA is somewhere it shouldn't be, it is useful. If it's somewhere it shouldn't be, that's an issue... I have one [case] where they [victim and accused] were brief acquaintances-DNA is important because he denies having sex even though he knows her/was arrested in her presence.

The next factor that emerged from the interviews when prosecutors were asked to identify factors that will lead to a rejection of charges is victim behavior. When asked how drugs and alcohol impact a case when the victim and/or the offender were intoxicated during the attack, prosecutors said it was likely that the presence of substances would not result in a successful prosecution. For example, 57% (n=15 of 26) of prosecutors in this study believed it to be beneficial to the defendant if they were intoxicated during the event because an attorney can argue that the defendant was not coherent enough to understand if the victim said no to sexual activity. Alternatively, prosecutors believed it is not beneficial to the victim to be intoxicated because a jury will likely perceive that the victim placed themselves in a risky situation and are to blame for their own victimization (e.g., victim blaming). To illustrate this point, one attorney said:

Victim that drinks or does drugs; jurors do not like them. They feel like [the victim] knew what they were getting into. Judges also do not like these types of cases; even in situations alleged that suspect slipped GHB [date rape drug] to victim... There is a double standard when it comes to cases that I try to explain to jurors...

Another prosecutor discussed this "double standard" where the presence of drugs and alcohol may negatively impact the victim but positively impact the suspect by saying:

Very rarely do we take into acct defendant's drug or ETOH [ethyl alcohol] use. It can be a defense-voluntary intoxication can negate intent. If drunk, they couldn't form the intent. As far as victim intoxication if it's rape but intoxication, and victim is saying I didn't say no but it's because I was so drunk I couldn't

formulate a word. But then they'll say afterwards I told him this, or beforehand I said this. Hard because they say they said something but then can't in another moment. One thing I've noticed is they'll say they texted their friends before and after, and we'll look at text messages and they've sent many with no spelling, etc....it's hard with those cases to tell the differences between being taken advantage of while drunk vs being raped. People may have done things they wouldn't do when sober, but it doesn't rise to the point of rape. Regrettable sex.

Lastly, victim credibility is assessed by prosecutors to establish if charges should be filed or not. Among the interviews, 41% (n=7 of 17) of prosecutors said that they evaluate victim credibility based on their gut feeling or a hunch they receive. Yet the gut feeling is based on facts, including whether the victim can corroborate their story, the victim's body language, and inconsistencies in the victim's story. Even further, prosecutors, especially those that have been in the field for many years, are experts at trying to predict which cases will be successful. So while attorneys may say it is a "gut feeling", it is really an advanced, quick assessment of all the factors they have. In the case of using their intuition, one attorney said:

It's a gut thing. Consistency in the story, honesty in other things...sometimes you can tell if they're telling the truth if they're honest about things that they wouldn't otherwise need to tell. Some things they disclose you wouldn't exactly want a stranger to know. Give info readily. Every time you ask them a question. Basically, I cross examine them when interviewing them, and I ask them what a defense attorney would ask. I don't want to offend you, but this is what a defense attorney would say. And I'd say this doesn't make sense. First you said this and now you're saying something else. In the end I'm not judging based on a bad decision, I just want to know what happened...

Despite the amount of evidence and corroboration present, prosecutors often believe that victim credibility and perceived truthfulness are critical for a sexual assault case to be successfully prosecuted. When asked what leads prosecutors to question whether the victim is telling the truth, one participant said:

I'm not a lie detector. It's the same routine in terms of picking a jury. How do you

know you are picking the right people? You don't. You make educated guesses, sometimes it's obvious they are lying, and it doesn't make sense. And it doesn't flow right. Basically, if you're a trial lawyer you are cynical about what anybody tells you. People lie and sometimes they lie to help themselves, to hurt someone, but the reality is when they come in here and they are interviewed. We all do interviews here, it is really up to us individually as to whether we believe the witness is going to be able to take the stand and be believable. Sometimes they have all the right things to say but their demeanor is such that they are a big problem to put on the stand because they are inarticulate or have social issues; some of the homeless people are like that.

The final step in the timeline of prosecuting sexual assault cases, once charges have been filed, is to either receive or not receive a conviction against the defendant. In some cases, there are certain factors which may lead to the dismissal of charges, which will be discussed next.

Part 3: “The Case Fell Apart”: Ultimate Dismissal of Cases

Once prosecutors have closely examined the merits of each case and made a “gut decision” to pursue it, there are factors that will either help or harm the case if it goes to trial. Once the decision has finally been made to file charges against the alleged offender, then there is the possibility of an issue arising in which the prosecutor must decide to dismiss the charges. The primary causes that could lead to this is the victim refuses to testify, does not appear at the trial, or they do not want to cooperate for some other reason—this explanation was given by 64% (n=14 of 22) of the prosecutors interviewed. When asked what could lead to the dismissal of charges, one attorney said:

Victim recanting or refusing to testify...If your victim isn't around and you couldn't put her on [the stand] for the preliminary, you don't have a case...Our policy is to have the victim testify at the prelim. Then if she disappears, we can read her testimony in at trial. But this can be problematic if the victim shows up later. Problem is that once you start that trial, jeopardy is attached, so we would have to dismiss the case and it could not be filed again.

The next factors that emerged in the interviews regarding a greater likelihood of the charges getting dismissed were if the victim's story changed or if holes in their story started to appear that could not be corroborated. Additionally, problems with DNA or other evidence causing it to be thrown out resulted in an unsuccessful outcome for the case. One prosecutor said:

After the preliminary hearing, you are still gathering evidence and doing the invest[igation]. As time progresses, may realize that the evidence you have it is not as strong as you thought it was. We sometimes use the phrase, "the case fell apart"—something comes out about the victim that pokes holes in her story and that the defense is going to use against us at trial. If the victim disappears or refused to cooperate, we don't necessarily have to dismiss the case. If we have done the prelim, we have her testimony and can go to trial without her testimony. But we don't like to do that—if we do, we need strong corroborative evidence outside of the victim's statement. If you don't have the victim and the corroborative evidence is not strong, you may have no choice but to dismiss the case. Does not mean that you can't refile it later if additional evidence surfaces.

Taken together, the results collectively communicate the specific factors of sexual assault cases – from beginning to end – that prosecutors deem critically important from the time they decide to file charges, what they look for to prosecute a case successfully, and what may lead to a case "falling apart" or the ultimate dismissal of charges after a case has been filed. The following section contextualizes the findings within the broader literature, identifies limitations of the current study, and offers specific suggestions for future research to further advance knowledge about the factors that prosecutors identify to make a "gut decision" about prosecuting sexual assault cases.

CHAPTER 5

DISCUSSION

The purpose of this study was to identify factors that influence prosecutors' decision to prosecute sexual assault cases. Interviews with deputy district attorneys from Los Angeles, CA revealed several important factors about factors they believed influenced the convictability of sexual assault cases. First, prosecutors were highly sensitive to the fact that the sexual assault cases must be able to be proven beyond a reasonable doubt (e.g., Beichner & Spohn, 2005; O'Neal, Tellis, & Spohn, 2015; Spohn & Holleran, 2001). Consistent with prior research, prosecutors in the current study emphasized the importance of corroboration of the victims' stories (Alderden & Ullman, 2012; Darwinkel, Powell, & Tidmarsh, 2014; Lievore, 2004; Westera, Kebbell, & Milne, 2013), physical evidence (Alderden & Ullman, 2012; Darwinkel, Powell, & Sharman, 2015), and victim cooperation (Dawson & Dinovitzer, 2001; Henning & Feder, 2005; Kaiser, O'Neal, & Spohn, 2017; Lievore, 2004). Another important finding from this study that has been found throughout previous literature is how alcohol and drugs negatively impact a case (Campbell, Menaker, & King, 2015; Henning & Feder, 2005; Lievore, 2004; Spohn, Beichner, & Davis-Frenzel, 2001). While prosecutors should avoid rape-myths and victim blaming, if the victim had drugs or alcohol in her system, it greatly decreases her credibility. Further, if the victim cannot remember her attack due to intoxication, the prosecutor does not have any information to build a case. All of these findings are significant and continuously appear in new studies, indicating their importance. Further, the focal concerns and uncertainty avoidance theories were discussed in the review of the literature. As related to the findings, prosecutors from the

sample did appear to follow these perspectives with corroboration and proof beyond a reasonable doubt being crucial in deciding to take a case. There is also a new finding that has come out of this study which should be studied further.

Indeed, prosecutors did not follow a one-size-fits all approach when assessing the convictability of cases. When making decisions about whether or not to pursue sexual assault cases, prosecutors often relied upon their “gut feeling” based on their perceptions of the available factors that make for successful prosecution (e.g., corroboration, evidence, victim cooperation). What this means is many sexual assault cases are at the mercy of whether the prosecutor believes that they have a strong enough case worthy of convincing a jury to convict.

Currently, there are no studies that assess the aspect of prosecutors relying upon their “gut feelings” when determining if the victim is telling the truth. However, one study found that prosecutors who use their gut feeling when making peremptory decisions about not using possible *jurors* was simply not enough (Harges, 2008). To further explain, when prosecutors were trying to read jurors to decide if they should be used in a trial or not, the prosecutors’ gut feeling was not satisfactory in doing so.

Implications.

The original purpose of this study was to examine sexual assault because it has become so prevalent in current times. The #MeToo Movement has recently gained a large following due to the number of sexual assault victims coming forward and telling their stories. By studying prosecutors’ beliefs on sexual assault cases, it can create new policies that can protect victims in the future, and hopefully reduce the number of victims as well. For example, a large issue for juries is that they fall into the trap of rape myths

and many times believe the victim may have deserved what happened to her because of what she was wearing, or her behavior prior to the attack (Dinos, Burrowes, Hammond, & Cunliffe, 2015; Ellison & Munro, 2010; Shepherd, 2002; Stewert & Jacquin, 2010). Related to the study, prosecutors from the interviews followed some of the rape-myths when they explained that a victims behavior, such as drug and alcohol use, impacted the decision to take a case. While they may have not realized they were doing it, or that they had to do it to maintain their integrity, it further implicates a victim in their own attack. One solution to this problem may be to educate juries and prosecutors about rape myths and why they are problematic. Similarly, by reporting the results of this study to the general public, it will raise awareness to what prosecutors are looking for in successful cases. It may be the push victims need to report to the police right away, or to receive a Sexual Assault Response Team exam, if they wish to receive a fair and just trial. Many studies have examined sexual assaults on college campuses because it is a relevant and reoccurring problem (Coulter & Rankin, 2017; O' Connor, Cusano, McMahon, & Draper, 2018; Potter, 2016). Based on the results from this study, educational posters, flyers, or presentations may help to inform students how crucial early reporting is.

Limitations and Future Research.

While this study did provide results that may be useful in finding ways to make changes to the problem, there are still limitations that need to be addressed. For example, some attorneys did not provide responses for all the questions; therefore, there were fewer responses for some questions. Because the identity of respondents remained confidential, it is impossible to connect responses from individual participants across interview questions. This creates the inability to make connections between a single

attorney's opinions on different issues regarding a sexual assault case, across the three different stages discussed above. Lastly, this study took place in Los Angeles, CA, and while this is the second largest city in the United States and is very diverse in many regards, it is not possible to generalize the findings to prosecutors throughout the country and there is a lack of representativeness with the nature of the sample being solely deputy district attorneys.

The limitations of the current study provide a backdrop for what future research should examine to further understand this topic. Firstly, this study should be replicated to make it more generalizable across the United States. This may mean taking a representative sample of attorneys across all fifty states. For example, some studies have solicited respondents at conferences, which is both convenient and reliable. The replicated study can also include factors that still make the interviewees anonymous, but have some indicator that allows responses across multiple questions to tie back to one respondent. More specifically, assigning each respondent a pseudonym that they can be referred to in the study provides anonymity, but also allows the possibility of making correlations between questions and their responses. Finally, future research might consider employing an observational approach wherein researchers observe prosecutors while they are doing their job and systematically document factors that prosecutors deem important for pursuing sexual assault cases, in addition to an interview approach. This allows the researcher to notice hidden attitudes towards the case or the victim that attorneys may not realize they are showing, and therefore would not disclose during the interviews. This can lead to future research that allows for study of possible interacting or intervening variables in prosecutors decision-making tactics.

Conclusion.

Many findings have come from this study; some which have been previously studied, and some that are new. From these findings, we can create policies, learn from our mistakes, and guide future research to further examine what factors appear to be beneficial to attorneys when prosecuting sexual assault cases. The #MeToo Movement has created a bond among victims that strongly encourages reporting their attackers. Until it is made aware that early reporting and corroboration, along with many other factors, are necessary to receive the fairness that is deserved, sexual assault will continue to happen with great prevalence, and will continue to fall through the criminal justice system. The goal is to stop sexual assault victimization, and reporting these results will take us one step closer to achieving that.

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APPENDIX A

[LIST OF INTERVIEW QUESTIONS]

This is not a comprehensive list of all the questions asked during the interview. These are just the ones being examined in this study.

Code#_ktlapd_____

Decision making in sexual assault cases: deputy district attorneys

Part I Training and Investigation of Sex Crimes

1. How long have you been a prosecuting attorney?
2. How long have you been investigating sex crimes?

Part II Sexual Assault Case Processing Decisions

1. Studies have shown that there is a high rate of case attrition in sexual assault cases. What accounts for this?
2. In your experience, which types of sexual assaults are least likely to result in successful prosecution?
3. Which types are most likely to result in successful prosecution?
4. Are charging decisions in sexual assault cases based on a standard of probable cause, proof beyond a reasonable doubt, or something else? Will you file charges if all of the legal elements of the crime (penetration, lack of consent, force) are present or do you evaluate the case based on the likely outcome if the defendant is tried before a jury?
5. Are there any types of cases where you would file charges even though you believed that the likelihood of conviction was low?
6. What factors do you take into account in deciding whether to file charges or not in a sexual assault case? What factors would incline you to reject the case?
7. How often does DNA evidence come into play in these cases? Are jurors looking for DNA evidence in sexual assault cases?
8. Studies also have shown that the credibility of the victim plays a role in sexual assault case processing decisions. How do you evaluate victim credibility?

9. What leads you to question whether the victim is telling the truth?
10. What role does use of drugs or alcohol by the victim and/or the suspect play in case outcomes?
11. Once sexual assault or sexual battery charges have been filed and the defendant has been bound over for trial, what would lead to dismissal of the charges?